O.C.B.C. LTD.

v.

PHILIP WEE KEE PUAN

PRIVY COUNCIL
LORD KEITH OF KINKEL
LORD ELWYN-JONES
LORD BRIDGE OF HARWICH
LORD TEMPLEMAN
DENYS BUCKLEY
[APPEAL NO. 5 OF 1983]
8 MAY 1984

CIVIL PROCEDURE: *Limitation - Claim for liquidated amount - Whether statute-barred - Letter of acknowledgment of debt - Section 26(2) Limitation Ordinance - Whether effective - Whether ought to have been pleaded.*

The respondent was a customer of the appellant bank. In 1963 he was granted overdraft facilities up to a limit of RM25,000. His father charged certain property as security for the overdraft up to the agreed limit. The respondent overdrew substantially in excess of the agreed limit by 8 September 1965, the date of the last transaction on the account by the respondent. On 3rd January, 1973, the bank demanded repayment of RM69,250.72, the amount outstanding. The bank then commenced foreclosure proceedings and as a result recovered RM25,000. On 14 June 1975, the bank commenced proceedings against the respondent. At the outset of the hearing, it was agreed that the amount of debt to be in the sum of RM44,250.72. The defence was that the debt was statute-barred.

In the course of the trial, a letter of acknowledgment dated 14 January 1974 was put in evidence by the appellant. The appellant had not pleaded any acknowledgment of debt either in the statement of claim or in the reply. The trial Judge gave judgment for the bank, on the ground that though the debt was statute-barred the letter of the respondent dated 14 January 1974, was an effective acknowledgment of the debt. On appeal, the Federal Court held that the letter constituted a new cause of action, and since it had not been pleaded in the statement of claim, the respondent was entitled to judgment. The appellant appealed.

Held:

[1] The respondent's letter of 14 January 1974, was an acknowledgment of his own indebtedness to the bank in respect of the overdraft.

[2] The only time when objection could have been taken to the admission in evidence of the letter, on the ground that the acknowledgment had not been pleaded, was when the evidence was tendered and since this had not been done, the letter became part of the total material on which the Judge had to decide the case.

[3] The letter therefore constituted an effective acknowledgment of debt, and the right of action could be deemed to have accrued on and not before that date.

[4] Since the writ in action had been issued well within the period of six years from the date of the letter, the bank's claim was not statute-barred (s. 26 (2), Limitation Ordinance 1953).

[Appeal allowed.]

Cases referred to:
Mat bin Lim & Anor. v. Ho Yut Kam & Anor. [1967] 1 MLJ 13
K.E.P. Mohamed Ali v. K.E.P. Mohamed Ismail [1981] 2 MLJ 10

Legislation referred to:
Limitation Ordinance 1953, ss. 6, 26(2)

For the appellant - George Newman QC, (C. Abraham with him)
For the respondent - John Bowyer

JUDGMENT

Lord Bridge of Harwich:

The respondent was a customer of the appellant bank who, in October 1963, applied for and was granted the facility to overdraw on his account up to a limit of RM25,000. On 21 January 1964 the respondent's father charged certain property, the site of a cinema hall, as security for the son's overdraft up to the agreed limit of RM25,000 and interest thereon. The last transaction on the account by the respondent was on 8 September 1965. The material before the Board does not disclose the precise sum by which the account was then overdrawn, but it was evidently substantially in excess of the agreed limit. The account thereafter remained dormant save for the continuing accrual of interest.

The bank took no steps to effect recovery until their solicitors wrote to the respondent on 3 January 1973 demanding repayment of RM69,250.72, the amount outstanding as at 26 December 1972. This evoked no reply. On 26 December 1973 the bank commenced foreclosure proceedings under the charge by originating summons against the Official Administrator as administrator of the estate of the father, who had since died, to which the respondent and other beneficiaries of the father's estate were made parties. As a result of these proceedings the bank in due course received from the estate RM25,000 due in respect of capital and RM8,562 interest thereon.

Meanwhile on 14 June 1975 the bank commenced proceedings by writ against the respondent. These proceedings came on for hearing before Mohamed Zahir J on 10 January 1980. The amount of the debt as at 26 December 1972, as claimed in the letter of 3 January 1973, had never been disputed by the respondent, and at the outset of the hearing his Counsel specifically agreed the amount of the debt as at that date, subject to liability, in the sum of RM44,250.72 after taking credit for the RM25,000 recovered by the bank in the foreclosure proceedings. The proceedings were then adjourned to 23 January 1980 when the effective hearing took place. The only defence relied on was that the claim was statute-barred.

The basic provisions of the Malaysian Limitation Ordinance 1953 correspond to those in force in England. In particular s. 6 provides a limitation period of six years from the date on which the cause of action accrued in contract, but s. 26(2) provides, so far as material:

> Where any right of action has accrued to recover any debt or other liquidated pecuniary claim ... and the person liable or accountable therefor acknowledges the claim ... the right shall be deemed to have accrued on and not before the date of the acknowledgment ... .

In the action the Limitation Ordinance had been pleaded in defence, but neither in the statement of claim nor in the reply had the plaintiff bank pleaded any acknowledgment of the debt. However, in the course of the trial, in re-examination of the only witness called for the bank, there was put in evidence a letter from the respondent dated 14 January 1974 addressed to the solicitors acting for the bank in the foreclosure proceedings in the following terms:

Dear Sirs,

Re: In the High Court in Malaya at Kota Bharu Originating Summons No. 109/73 Oversea-Chinese Banking Corpn. Ltd.

v.

1. The Official Administrator, Malaya (as the administrator of the estate of Wee Sidk Hor, deceased)
2. Wee Choo Luan @ Wee Chui Luan
3. Wee Choo Hong @ Wee Chui Hong
4. Philip Wee Kee Puan @ Wee Kee Phuan
5. Teh Eng Bee @ Tay Eng Bee.

I am one of the respondents above-named. I write to request for a postponement of the application to a date sometime in the middle of March 1974 so as to enable me to raise as initial payment to O.C.B.C. Ltd., Kota Bharu a sum of about $25,000 from the sale of a rubber estate amounting to about 29 acres.

I hope to arrange to sell the property comprised in the charge and from the proceeds thereof the official administrator will be able to pay the balance owing to O.C.B.C. Ltd. I shall be able to disclose to the Court at the next date of hearing as to whether the sale of the property could be finalized.

Yours faithfully.

No objection was raised to the reception of this letter in evidence by Counsel for the respondent. He was specifically asked by the Judge if he wished to put any questions concerning the letter to the witness, but he declined this offer. He called no evidence for the respondent.

The argument before the learned Judge then proceeded on two issues: first whether the bank's cause of action originally accrued at the date of the last transaction on the respondent's account, as contended for the respondent, or on the date of the bank's demand, as contended for the bank; secondly, if the respondent was right on the first issue, whether the respondent's letter of 14 January 1974 was an effective acknowledgment of the debt such that the right of action was deemed to have accrued on and not before that date. The learned Judge held in favour of the respondent on the first of these issues, but in favour of the bank on the second and accordingly gave judgment for the bank for the agreed sum of RM44,250.72 and appropriate interest thereon from 26 December 1972.

On appeal to the Federal Court the respondent took for the first time the point that the bank was not entitled to rely on the letter of 14 January 1974 as an acknowledgment of the debt because it had not been pleaded. The Court (Wan Suleiman and Salleh Abas, FJJ and Hashim Sani J) acceded to this submission. They held that the letter of 14 January 1974 "... constitutes a new cause of action ..." and unless pleaded in the statement of claim, the respondent was entitled to judgment "... because the debt having been statute-barred the statement of claim therefore discloses no cause of action". The Court purported to rely on a decision of Raja Azlan Shah J, as he then was, sitting as a Judge of first instance in *Mat bin Lim & Anor. v. Ho Yut Kam & Anor.* [1967] 1 MLJ 13. Their Lordships do not find it necessary to examine the details of this case. A very much more recent decision of the Federal Court (Raja Azlan Shah CJ, Wan Suleiman and Abdul Hamid FJJ) in the case of *K.E.P. Mohamed Ali v. K.E.P. Mohamed Ismail* [1981] 2 MLJ 10, is precisely to the contrary of the instant decision under appeal and was in their Lordships' opinion clearly rightly decided. In that case the Federal Court reversed the decision of the trial Judge, who had held the plaintiff's claim statute-barred. Giving the judgment of the Court in that case, Raja Azlan Shah CJ said at p. 11:

Counsel for the defendant submitted that any acknowledgment of the liquidated pecuniary claim creates a new cause of action which is different from the cause of action which had accrued from the contract on which the claim was based. We reject that argument. An acknowledgment of a statute-barred debt does not raise a new claim or a new cause of action but constitutes the accrual of the right of action to recover the debt: see *Busch v. Stevens* [1962] 1 AER 412. We also refer to the speech of Lord Sumner in *Spencer v. Hemmerde* [1922] 2 AC 507 at p. 524:

> I find that the great preponderance of the cases is against regarding the new promise as a new cause of action, and it seems to me that reason also is against it. Surely the real view is, that the promise, which is inferred from the acknowledgment and 'continues' or 'renews' or 'establishes' the original promise laid in the declaration, is one which corresponds with and is not at variance from or in contradiction of that promise... . If so, there is no question of any fresh cause of action.

He went on to consider whether, in a case where limitation is relied on, an acknowledgment should be pleaded. He concluded, rightly in their Lordships' opinion, that it should but added:

> Be that as it may, this aspect of the case has been satisfactorily presented and developed in the proceedings before the High Court and we think there are materials on the record from which a decision to that effect could be arrived at. As one of the objects of modern pleadings is to prevent surprise, we cannot for one moment think that the defendant was taken by surprise.

So, in the instant case, the only time when objection could have been taken to the admission in evidence of the respondent's letter of 14 January 1974, on the ground that the acknowledgment had not been pleaded, was when the evidence was tendered. It is true that if the objection had then been taken and application had been made to amend the pleadings, this could have been successfully opposed on the ground that by 23 January 1980 the right of action deemed to have accrued on the date of the letter had itself become statute-barred. But once the letter was received in evidence without objection this consideration became immaterial. The letter became part of the total material on which the Judge had to decide the case and since the writ in the action had been issued well within the period of six years from the date of the letter, the bank's claim, if the letter constituted an effective acknowledgment, was not statute-barred.

Before the Board, Counsel for the respondent renewed the main argument unsuccessfully addressed to the trial Judge to the effect that the respondent's letter of 14 January 1974 was not an acknowledgment of his indebtedness to the bank. It was contended that the terms of the letter showed it to have been written by the respondent purely in his capacity as a party to the foreclosure proceedings against his father's estate and it must therefore be construed as acknowledging the indebtedness of the estate under the charge only, not the personal indebtedness of the respondent on the overdraft. Their Lordships reject this argument. The amount of the outstanding overdraft was undisputed and the respondent's acknowledgment of the debt due from the estate under the charge by which the overdraft was, *pro tanto*, secured, necessarily implied an acknowledgment of his own indebtedness in respect of the overdraft.

Being in favour of allowing the bank's appeal on these grounds, their Lordships find it unnecessary to express any opinion in relation to the interesting argument addressed to them by Counsel for the bank to the effect that the original cause of action accrued to the bank not on 8 September 1965, the date of the last transaction by the respondent on the account, but on 3 January 1973, the date when the bank's solicitors first wrote to the respondent demanding repayment.

Their Lordships will accordingly advise His Majesty the Yang di-Pertuan Agong that the appeal should be allowed, with costs before the Federal Court and the Board, and the judgment of Mohamed Zahir J restored.

Also found at [1984] 2 CLJ 4